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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 179

FARBWERKE vormals MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, and BADISCHE-ANILIN & SODA-FABRIK, Petitioners,

v.

CHEMICAL FOUNDATION, INC., E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 180

FARBWERKE vormals MEISTER LUCIUS & BRUNING, Petitioner,

v.

E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 181

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, Petitioner,

v.

E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT E. I. du PONT de NEMOURS & COMPANY.

G. CARROLL TODD,
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W. S. GREGG,
Of Counsel.

[NOTE: For additional captions see inside cover.]

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No. 180

FARBWERKE vormals MEISTER LUCIUS & BRUNING, Petitioner,

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E. I. du PONT de NEMOURS & CO, and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 181

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, Petitioner,

v.

E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 182

BADISCHE-ANILIN & SODA-FABRIK, Petitioner,

v.

E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 271.

WALTER O. WOODS, as Treasurer of the United States, Petitioner,

v.

THE CHEMICAL FOUNDATION, INC., and E. I. du PONT de NEMOURS & CO., Respondents.

No. 272

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

FARBWERKE vormals MEISTER LUCIUS & BRUNING, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 273

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 274

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

BADISCHE ANILIN & SODA-FABRIK, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT E. I. du PONT de NEMOURS & COMPANY.

Statement of the Case.

On June 23, 1922, the Chemical Foundation, Inc., then the owner of United States letters patent Nos.

680,395, 718,340 and 868,294, formerly enemy-owned, sued E. I. du Pont de Nemours & Company in the District Court for Delaware under § 10 (f) of the Trading with the Enemy Act, 40 Stat. 411, 421, to recover compensation for the use of the patents under a license from the Federal Trade Commission, granted January 21, 1918, pursuant to § 10 (c) of the same Act and an Executive Order dated October 12, 1917, and surrendered September 1, 1920. Rec. 11, 27, 34, 131, 132.

The license provided for a royalty of 5 per cent of the net profits, Rec. 28, subsequently changed to 2 per cent of the gross sales, Rec. 32, which was deposited with the Treasurer of the United States under § 10 (d) of the Trading with the Enemy Act, 40 Stat. 421, "as a trust fund for the said licensee and for the owner of the said patent, * * *."[1] The Treasurer as holder of this fund was made a codefendant.

The Chemical Foundation acquired the patents, "together with every right, title, and interest with respect thereto," April 10, 1919, by assignment from the Alien Property Custodian, Rec. 81, who had previously seized the same by demands served February 20, 1919, and March 26, 1919, under authority of the Trading with the Enemy Act as amended by the Act of November 4, 1918, 40 Stat. 1020, 1021. Rec. 75-76; 77-78; 79-80.[2]

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[1] The du Pont Company paid in $61,884.98 under this provision. Rec. 47.

[2] These are the conveyances that this Court considered and upheld in *United States* v. *Chemical Foundation*, 272 U. S. 1, 71 L. ed. 131.

The Chemical Foundation asserted its ownership of the patents, "and of every right, title, and interest therein, including the rights inuring to the owner * * * under Section 10 of the Trading with the Enemy Act," one such being the right to recover compensation "for all use and enjoyment" of the patents by the Federal Trade Commission's licensee, the du Pont Company. Complaint, pars. VIII, X, Rec. 13, 14; Op. C. C. A., Rec. 185.[1] In the prayer for relief, however, the Chemical Foundation, for considerations which the record does not disclose, waived its claim for compensation for the use of the patents prior to its acquisition of them. Complaint, Rec. 14; Op. Dist. Ct., Rec. 137, 144, 150; Op. C. C. A., Rec. 185, 187; Decree, Rec. 150.[2]

On June 30, 1922, the former enemy owners of the patents, three German corporations, brought suit against the du Pont Company in the same court and under the same provision of the statute, claiming com-

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[1] The petition for certiorari, p. 5, erroneously states that the Chemical Foundation asserted no right to the royalties which had accrued prior to the seizure and sale of the patents.

[2] Until August 1, 1919, the royalty payable under the Federal Trade Commission's license was, as previously stated, 5 per cent of the *net profits*. Rec. 28, 32. The du Pont Company's answer states that no royalties were payable under the Federal Trade Commission's license prior to April 10, 1919, when the Chemical Foundation acquired the patents. Rec. 43. Presumably, therefore, no net profits were derived from the use of the patents prior to that time.

pensation for "all use and enjoyment of the said patents" by the du Pont Company under the Federal Trade Commission's license. Rec. 34, 36, 39. Subsequently they limited their claims to royalties that had accrued at the time of the assignment to the Chemical Foundation—the so-called accrued royalties. Rec. 137, 186. In these suits also the Treasurer of the United States was made a codefendant.

On October 6, 1927, the suit of the Chemical Foundation and the three suits of the former German owners were consolidated for trial. Rec. 44.

On April 28, 1928, the Alien Property Custodian, claiming that he was the owner of the patents during the one-year period following the end of the War, within which suits under § 10 (f) were required to be brought, and as such was the only person authorized to bring suit for compensation for the use of the patents, and that notwithstanding that the period of limitations for bringing such suits had expired he was entitled under § 19 of the Settlement of War Claims Act of 1928, 45 Stat. 254, to be substituted as plaintiff in place of the three German corporations, made a motion that that be done. Rec. 53.

The Alien Property Custodian contended that he had seized the right to the so-called accrued royalties along with the patents but did not assign it to the Chemical Foundation. Op. Dist. Ct., Rec. 146, 29 F. (2d) 597, 603; Op. C. C. A., Rec. 186, 192, 39 F. (2d) 366, 369, 371.

The District Court adjudged the Chemical Foundation to be the owner of the patents from and after

April 10, 1919, and as such entitled to recover from the du Pont Company reasonable compensation for all use and enjoyment thereof under the license granted by the Federal Trade Commission, "without regard to whether or not such use and enjoyment was wholly or in part before or after said April 10, 1919," the amount to be ascertained by an accounting. Rec. 149-150. Since, however, the Chemical Foundation had waived its claim for compensation for the use of the patents prior to April 10, 1919 (the date of its acquisition of them), the decree directed that the accounting be limited to the use of the patents by the du Pont Company subsequent to that date. Rec. 150. The du Pont Company did not dispute its liability to this extent.

Both the District Court and the Circuit Court of Appeals decided against the claims of the former German owners, *on the ground that the right to the accrued royalties was seized by the Alien Property Custodian with the patents themselves and passed to the Chemical Foundation by the assignment of April 10, 1919.* Rec. 152, 154, 156; 195, 197, 198, 199. On that and other grounds they also overruled the motion of the Alien Property Custodian to be substituted as plaintiff in place of the former German owners. Rec. 151, 153, 155; 197, 199, 200.

The opinion of the District Court is reported in 29 F. (2d) 597; that of the Circuit Court of Appeals in 39 F. (2d) 366.

The three German corporations, former owners of the patents, joined in one petition for a writ of cer-

tiorari, No. 179, and also filed separate petitions, Nos. 180, 181 and 182, all of which were granted.

The petitioner in No. 271, the Treasurer of the United States, and the petitioner in Nos. 272, 273 and 274, the Alien Property Custodian, do not now dispute the correctness of the decisions below. They applied for writs of certiorari only to assure that all the decrees would be before this Court in the event that it granted the application of the former German owners. (Pet. 4-5.)

Section 10 (f) of the Trading with the Enemy Act, under which the suits were brought; the amendment thereof contained in § 19 of the Settlement of War Claims Act of 1928; § 10 (c) of the Trading with the Enemy Act, under which the Federal Trade Commission granted the du Pont Company the license to use the patents in question; § 10 (d) of the same Act providing that the royalties paid by licensees under § 10 (c) shall be held in the Treasury of the United States as a trust fund; § 7 (c) of the same Act, as amended by the Act of November 4, 1918, under which the patents were seized by the Alien Property Custodian; and the fourth paragraph of § 12 of the same Act, as amended by the Act of March 28, 1918, under authority of which the Alien Property Custodian sold the patents to the Chemical Foundation, are set forth in the Appendix.

The Issues.

The petition for certiorari of the former German owners stated, p. 5, as a reason why the writ should be granted, that the District Court and the Circuit

Court of Appeals decided that § 19 of the Settlement of War Claims Act of 1928, amending § 10 (f) of the Trading with the Enemy Act, was unconstitutional.

We do not so understand the decisions below. All that either the District Court or the Circuit Court of Appeals said on that question was that the statute *would be* unconstitutional *if* construed as revesting in the former German owners the right to recover the so-called accrued royalties after that right had been seized by the Alien Property Custodian and transferred to the Chemical Foundation for value. Op. Dist. Ct., Rec. 144-145; Op. C. C. A., Rec. 190-191.

And even in that form the question has been removed from the case, as the former German owners are not now contending that they could maintain a suit under that provision to recover accrued royalties the right to which the Alien Property Custodian had duly seized and assigned to third parties before the provision was enacted.

If, therefore, the courts below were correct in holding that the right to recover the so-called accrued royalties was seized by the Alien Property Custodian when he seized the patents, that is the end of the case.

If they were wrong as to that another question arises—whether the German corporations are not barred from maintaining these suits because not the owners of the patents at any time during the period limited by § 10 (f) of the Trading with the Enemy Act for bringing suit to recover compensation for the use of patents under licenses granted by the Federal Trade Commission pursuant to § 10 (c) of the same Act.

Summary of Argument.

The whole argument for the German corporations as now made rests upon the hypothesis that when the Alien Property Custodian seized their patents he did not seize the right to recover from the du Pont Company, as the Federal Trade Commission's licensee, compensation for the use of the patents prior to the seizure, but left that right still vested in them.

By demands dated February 20, 1919, and March 26, 1919, the Alien Property Custodian, acting under authority of the Trading with the Enemy Act, as amended by the Acts of March 28, 1918, and November 4, 1918, seized the patents in question, "and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof." Rec. 75, 76; 77, 78; 79, 80.

On April 10, 1919, the Alien Property Custodian sold and assigned to the Chemical Foundation everything seized by these demands. Rec. 81.

The respondents maintain that by these demands the Alien Property Custodian seized, along with the patents, the right to recover from the du Pont Company compensation for all use of the patents under the Federal Trade Commission's license, not only for their use after the seizure, but before as well, i. e., the so-called accrued royalties. This was also the position of the Alien Property Custodian. Op. Dist. Ct., Rec. 146, 29 F. (2d) 597, 603; Op. C. C. A., Rec. 186, 192, 39 F. (2d) 366, 369, 371.

The District Court and Circuit Court of Appeals so held. The District Court said:

> "That the comprehensive language of the instruments of seizure embraced accrued royalties cannot, I think, in view of the purpose and scope of the amendment of November 4, 1918, be open to doubt." Rec. 142; 29 F. (2d) 597, 601.

The Circuit Court of Appeals said:

> "Having in mind the purpose of the law and observing that the Custodian manifestly attempted to seize the German patents and everything 'in respect' to them and to their ownership, we are of opinion that he accomplished what he attempted by words that embraced the royalties in question, and that, in consequence, the German plaintiffs were owners of neither the patents nor the royalties at the time they instituted their suits * * *." Rec. 190; 39 F. (2d) 366, 371.

The identical point had previously been decided the same way in *Hicks* v. *Anchor Packing Co.*, 16 F. (2d) 723, C. C. A. 3rd. There it was held that a seizure of a trade-mark in these same terms [1] was broad enough to divest the enemy owner not only of the trade-mark but of the right to so-called accrued royalties, i. e., the right to recover from the Federal Trade Commission's licensee compensation for the use of the trade-mark prior to the seizure. The opinion states:

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[1] The instrument of seizure demanded the trade-mark "and every right, title and interest with respect thereto." 16 F. (2d) 727.

> "The quoted provision of the statute [§ 7 (c) of the Trading with the Enemy Act as amended November 4, 1918] is broad enough to warrant the demand thus made and the demand was broad enough to embrace the license and *accrued royalties.*" 16 F. (2d) 727. [Italics ours.]

The respondent the du Pont Company contends further that even if the right to compensation for the use of the patents prior to their seizure remained vested in the German corporations the latter cannot maintain these suits because not the owners of the patents at any time during the one year after the end of the War within which suits to recover compensation for the use of patents under licenses granted by the Federal Trade Commission pursuant to § 10 (c) of the Trading with the Enemy Act were required to be brought.

Argument.

Point I.

By the demands of the Alien Property Custodian dated February 20, 1919, and March 26, 1919, the German corporations were divested of all property rights in and in respect of the patents in question, including the right of action given by § 10 (f) of the Trading with the Enemy Act against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents, before as well as after the seizure.

1. Section 7 (c) of the Trading with the Enemy Act, as amended by the Act of November 4, 1918, 40 Stat.

1020, specifically authorized the seizure of enemy-owned property of all kinds, including "patents, copyrights, * * * trade-marks, choses in action, and rights and claims of every character and description * * *."

The purpose of the Act has been stated by this Court as follows:

> "At the time of the passage of the act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their property should be taken over and that trade with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid." *Miller* v. *Robertson*, 266 U. S. 243, 248, 69 L. ed. 265, 271.

It has also been held that,

> "There is nothing to support a strict construction of the Act in respect of the seizure and disposition of enemy property;"

and that it

> "should be liberally construed to give effect to the purposes it was enacted to subserve." *United States* v. *Chemical Foundation*, 272 U. S. 1, 10, 71 L. ed. 131, 141.

For the same reason the instruments of seizure should be liberally construed. And so Executive Order No. 1813 provides:

> "A demand for the conveyance, transfer, assignment, delivery and payment of money or

> other property *unless expressly qualified or limited* shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover." Rec. 102, 104. [Italics ours.]

The language of the instruments of seizure in the present case, "letters patent and every right, title and interest with respect thereto," was broad enough to include the right to compensation that had accrued under licenses to use the patents, and, in the light of the purpose of Congress in authorizing the seizure as above set forth, must be so construed. What the Court said of the statute itself is equally applicable to seizures under it—

> "There is no support for a construction that would restrain the force of the broad language used." *United States* v. *Chemical Foundation*, 271 U. S. 1, 11, 71 L. ed. 131, 141.

Besides, the language of the instruments of seizure expressly included "all damages and profits * * * for past infringement * * *."

While the du Pont Company used the patents under a license from the Federal Trade Commission, nevertheless, it used them without the permission of the owners, and therefore, as the District Court and the Circuit Court of Appeals both held, what it owed for such use partook more of the nature of "damages and profits for past infringement" than of "royalties" under a true license. Rec. 142, 188.

2. The right to recover from the Federal Trade Commission's licensee compensation for the use of a formerly enemy-owned patent, before as well as after the seizure, was made an inseparable incident of ownership of the patent by the Trading with the Enemy Act itself.

The right was created by § 10 (f) of the Act, and authority to enforce it by suit was vested exclusively in the *owner of the patent*. *Post*, 29. Indeed, by another section of the Act, § 10 (c), *post*, 31, suit by any one else was expressly barred.

Unless the effect of these provisions was to make the right to sue for compensation for past as well as future use inseparable from ownership of the patent, that right would be left without any remedy whatever for its enforcement where it had become separated from ownership of the patent—a result which could not have been intended.

It follows that when the Alien Property Custodian seized a patent under the Trading with the Enemy Act as amended November 4, 1918, he acquired, without more, along with the ownership of the patent, the right to recover from the Federal Trade Commission's licensee reasonable compensation for the use of the patent, as well before as after the seizure.

So, therefore, the instrument of seizure in the present case in specifying, besides the patents themselves, "every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity • • • for past infringement thereof," did more than was necessary in order to seize the right

to recover from the du Pont Company, as the Federal Trade Commission's licensee, compensation for the use of the patents prior to the date of seizure.

3. The demands of February 20, 1919, and March 26, 1919, by which the seizure was effected, were expressly confirmed by the Alien Property Custodian as including the right to recover compensation for the use of the patents under the Federal Trade Commission's license prior to the date of seizure.

On April 10, 1919, the Alien Property Custodian, under the authority of Executive Orders promulgated February 26 and April 5, 1919, by Frank L. Polk, acting for the President, Rec. 125, 127, assigned to the Chemical Foundation "the whole right, title, and interest acquired by * * * said Alien Property Custodian, as aforesaid, in and to" the patents here in question, "together with all claims and demands for profits and damages recoverable at law or in equity for the past infringement of said letters patent of the United States against every person, firm, corporation, or government except the Government of the United States of America." Rec. 81, 83-84.

Doubt having arisen as to the authority of the Alien Property Custodian to sell and convey to the Chemical Foundation "certain of the said choses in action, * * * and rights and claims, including rights to receive moneys by way of royalties or otherwise, as compensation for the use of patents," the President, by Executive Order dated February 13, 1920, confirmed the authority of the Alien Property Cus-

todian in that regard, and further authorized him "to confirm and ratify the said sales by the execution and delivery of a suitable instrument of confirmation," reciting as his reason that "the public interest will be best served by the elimination of *any enemy interest* adverse to American citizens arising by reason of said choses in action, or rights." Rec. 88, 89-90.

Thereafter, on March 1, 1921, the Alien Property Custodian executed a confirmatory assignment to the Chemical Foundation, ratifying the prior sales of the patents, and specifically including "all choses in action, * * * and rights and claims of every character and description growing out of and appurtenant to the ownership of said property, including (but not thereby limiting the generality of the foregoing) rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, * * *, and all right, title and interest in and to the choses in action and funds referred to in section 10 subsection (f) of the Trading with the Enemy Act, as amended, acquired by the Alien Property Custodian by virtue of the seizures by which there were seized patents * * *, under which a license had theretofore been granted in accordance with the provisions of section 10 subsection (c) of said Act as amended, * * *." Rec. 90, 95. This instrument was duly recorded in the United States Patent Office. Stip., par. XV, Rec. 74.

Here is an explicit construction by the Alien Property Custodian of the original instruments of seizure as including "the choses in action and the funds referred to in section 10 subsection (f) of the Trading

with the Enemy Act," i. e., as including the right to the so-called accrued royalties.

As the War was not declared at an end until July 2, 1921, S. J. Res. 16, 42 Stat. 105, the Alien Property Custodian still had full power to seize enemy-owned property, and therefore this construction by him of the original instruments of seizure as including the right to the accrued royalties had the same effect as if he had seized that right by a new demand, the statute prescribing no particular method of seizure.

4. The former German owners of the patents contend that the second paragraph of subsection (c) of § 7 of the Trading with the Enemy Act, as amended November 4, 1918, "expressly provides that the instrument of seizure * * * shall in the case of patents 'have the same force and effect as a duly executed assignment,'" and that an assignment of a patent and of "every right, title and interest with respect thereto," would not include either the right to damages for infringements prior to the assignment or the right to accrued compensation for the use of the patent under a license prior to the assignment. Brief for Farbwerke Vormals Meister Lucius & Bruning, pp. 18-26.

This argument recognizes that unless otherwise provided by the statute a seizure of enemy property and a voluntary assignment would be governed by different rules of construction,—that, as the courts below held, a voluntary assignment, whether of a patent or other property, would be construed strictly, because the presumption is that an assignor does not intend to part with anything not plainly within the terms of his grant,

whereas an instrument of seizure of enemy-owned property would be construed liberally so as to give effect to the purpose of Congress to weaken enemy countries by depriving their supporters of power to give aid by taking over their property.

Turning to the argument itself, the short answer is that it is based on a mistaken premise. The statute does *not* provide that the instrument of seizure shall have the same force and effect as an assignment between private parties. All that it provides is that the instrument of seizure "*may* be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances," and that, "*if* so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded." 40 Stat. 1020. Obviously the purpose of this provision was merely to define the conditions under which third parties dealing with the owner of a patent which had been seized would be charged with notice of the seizure.

In addition, even as regards voluntary conveyances, we dispute the proposition that there is any general rule that an assignment of a patent, and of "every right, title and interest with respect thereto," or one of similar scope, can never be taken to include the right to sue for past infringements or for compensation for past use.

None of the cases cited in the opposing briefs goes that far. On the other hand, in the case of *May* v.

Saginaw County, 32 Fed. 629, where the owner of a patent assigned "all the right, title, interest, claims and demands whatsoever, * * * in, to, by, over and through the said improvements and letters patent," it was held by Judge Brown (later Mr. Justice Brown of this Court) that the right to damages for past infringements *was* included. Otherwise, as he states, p. 632, the language would have no effect at all, "since a bare assignment of the patent would carry with it the right to sue for all future infringements."

In *Dibble* v. *Augur*, 7 Blatch. 86, Fed. Cas. No. 3879, so much relied upon in the brief for the petitioner Farbwerke Vormals Meister Lucius & Bruning, pp. 24-25, the assignor of the patent, as Judge Brown points out in *May* v. *Saginaw County*, 32 Fed. 631, expressly reserved the right to sue for past infringements.

5. The brief for the petitioner Farbwerke Vormals Meister Lucius & Bruning states:

> "That Congress did not intend that the seizure of a patent and of every right with respect thereto should, without more, operate to seize royalties accrued prior to the seizure, is further evidenced by the amendment of 1928, confirming the right of former enemy owners of seized patents to recover 'royalties for the period prior to the sale' of such patents by the Alien Property Custodian." P. 27.

The argument is that if such royalties had been seized there would have been nothing for the amend-

ment of 1928 to operate upon. P. 27. But there is nothing to show that there may not have been cases where the instrument of seizure expressly excepted royalties that had accrued prior to the date of seizure.

Besides, even if the construction of an act of Congress could be controlled, after it has been acted upon, by any subsequently declared intention of Congress, we are not construing an act of Congress here. We are construing the language of the Alien Property Custodian; and what he intended to be included in his seizure of the patents, "and every right, title and interest with respect thereto," cannot be affected by an act of Congress passed eight years later.

Compare *Shaw* v. *Carpenter*, 280 U. S. 363, 74 L. ed. 478, where a later act of Congress was invoked to show what was intended by a clause relating to exemptions from taxation in an agreement with the Choctaw and Chickasaw Indian tribes embodied in an earlier act. This Court held:

> "Whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now, since it may not be narrowed by any subsequently declared intention of Congress." 280 U. S. 367, 74 L. ed. 481. See also *Pampanga Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218, 73 L. ed. 665, 669.

6. It is also contended that the Alien Property Custodian had no authority to seize the right to recover the so-called accrued royalties. This question was not raised in the Circuit Court of Appeals, nor in the petition for certiorari or the assignments of error in this

Court, and therefore for a double reason is not open. *Duignan* v. *United States*, 274 U. S. 195, 200, 71 L. ed. 996, 1000; *Herbring* v. *Lee*, 280 U. S. 111, 117, 74 L. ed. 217, 221; *Gunning* v. *Cooley*, 281 U. S. 90, 98, 74 L. ed. 720, 726. Indeed, as stated in the brief for the petitioner Farbwerke Vormals Meister Lucius & Bruning, p. 40, "In the brief in support of the petition for certiorari authority to seize this right was conceded."[1]

But assume the question to be open. Section 7 (c) of the Trading with the Enemy Act as amended by the Act of November 4, 1918, *post*, 33, authorized the seizure of enemy-owned property of all kinds, including specifically "patents, * * * choses in action, and rights and claims of every character and description * * *."

Concededly this language, "literally construed, is broad enough to authorize the seizure of the right to the recovery of royalties under Presidential licenses prior to the sale of patents seized." Brief for Petitioner Farbwerke Vormals Meister Lucius & Bruning, p. 40. The argument is that it was not the intention of Congress to include such rights, as shown by the legislative history.

The legislative history shows that the immediate object of the Act of November 4, 1918, was to make clear and adequate the powers of the Alien Property Custodian with respect to enemy-owned patents and shares

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[1] The brief in support of the petition for certiorari, filed on behalf of all the German corporations, stated: "Under the Act the Alien Property Custodian undoubtedly had authority to seize the royalties as well as the patents." P. 16.

of stock. But there is nothing whatsoever to show that Congress intended the right to recover compensation for the use of patents, either before or after seizure, to be excluded from the operation of the Act. Indeed, the description of property authorized to be seized in § 7 (c) of the Trading with the Enemy Act as originally enacted, before it was enlarged by the Act of November 4, 1918, was itself sufficient to include this right.[1]

Anyhow, as this Court recently said in rejecting a similar resort to legislative history for the purpose of giving the terms of a statute "a narrower meaning than a literal reading of them conveys,"

> "The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger in the one case of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include." *Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S.

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[1] As originally enacted § 7 (c) provided: "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an emeny or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

245, 253, 73 L. ed. 311, 313. See also *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 278, 73 L. ed. 323, 377.

Here, moreover, not only does the right to recover the so-called accrued royalties fall within the plain description of the property authorized to be seized, but including it accords with the fundamental purpose of the Trading with the Enemy Act "to weaken enemy countries by depriving their supporters of their properties." *United States* v. *Chemical Foundation*, 272 U. S. 1, 9-10, 71 L. ed. 131, 140.

Point II.

The German corporations having been divested of ownership of the patents in question prior to the commencement of the present suits, those suits cannot be maintained under § 10 (f) of the Trading with the Enemy Act as originally enacted even though the right of action against the du Pont Company for the use of the patents prior to their seizure had remained vested in the German corporations, and § 19 of the Settlement of War Claims Act of 1928 cannot be construed as providing otherwise without makng it unconstitutional.

Section 10 (f) of the Trading with the Enemy Act as originally enacted provided that:

> "The *owner* of any patent, trade-mark, print, label, or copyright under which a license is

> granted hereunder may, after the end of the War and until the expiration of one year thereafter,[1] file a bill in equity against the licensee in the district court of the United States * * *, for recovery from the said licensee for all use and enjoyment of the said patented invention, trademark, print, label, or copyrighted matter." [Italics ours.]

No one other than the owner of the patent, trademark, label or copyright was authorized to bring such a suit. Indeed, as before stated, by another provision of the statute, § 10 (c), suit by anyone else was expressly barred.

It was doubtless to meet this requirement of the statute that the German corporations alleged in their bills of complaint that they were the owners of the patents when the suits were brought—June 30, 1922. Rec. 35, 37, 39. Subsequently, however, the seizure of the patents by the Alien Property Custodian in February and March, 1919, and their sale to the Chemical Foundation on April 10, 1919, were upheld by this Court in *United States* v. *Chemical Foundation,* 272 U. S. 1, 71 L. ed. 131.

It follows that even though the right of action against the du Pont Company for the use of the patents prior to their seizure by the Alien Property Custodian had remained vested in the German corporations, these suits would be barred because prior to their commencement the German corporations had

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[1] The War ended July 2, 1921. S. J. Res. 16, 42 Stat. 105.

ceased to be the owners of the patents by reason of the Alien Property Custodian's seizure.

This was decided in *Hicks* v. *Anchor Packing Co.*, 16 F. (2d) 723. There an Hungarian company, as the owner of a trade-mark at the time it was seized by the Alien Property Custodian, claimed to be still the owner within the meaning of § 10 (f) of the Trading with the Enemy Act, and as such entitled to recover from the Federal Trade Commission's licensee compensation for the use of the trade-mark. The Circuit Court of Appeals, Third Circuit, held not, citing the decision of this Court in *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 71 L. ed. 131, and saying:

> "From this it is clear that the Hungarian company, when the custodian seized its trade-mark, parted with its ownership and also with its claim to the proceeds of the license for its use. We hold that at the time this suit was brought the Hungarian Company was not the 'owner' within the meaning of § 10 (f) of the Act." 16 F. (2d) 727.

But, it is said, that § 10 (f) was amended by § 19 of the Settlement of War Claims Act of 1928, so as to provide that any suit brought thereunder, within the time limited therein, shall be considered as having been brought by the owner of the patent "if brought * * * by the person who was the owner thereof immediately prior to the date such patent * * * was seized or otherwise acquired by the Alien Property Custodian."

In 1928, however, the time limited by § 10 (f) for bringing suit against the Federal Trade Commission's

licensee—one year after the end of the War—had long since expired.

And where, as here, the statute which creates a liability limits the time within which suit may be brought to enforce it, "the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone," and consequently if suit be not brought within the prescribed time the liability itself is extinguished. *The Harrisburg,* 119 U. S. 188, 214, 30 L. ed. 358, 362.

Section 10 (f) further provided that if suit were not brought by the owner of the patent within one year after the end of the War,

> "then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian."

thus making doubly clear the intention of Congress that in such event the obligation itself should become extinguished.

It follows that if § 19 of the Settlement of War Claims Act of 1928 be construed as giving life to the suits brought against the du Pont Company by the German corporations when they were no longer the owners of the patents, and therefore without any right to sue, *ante,* 11, it would, by reinstating a liability which had become extinguished, deprive the du Pont Company of its property without due process of law in contravention of the Fifth Amendment.

In *Danzer & Co.* v. *Gulf & Ship Island R. Co.,* 268 U. S. 633, 69 L. ed. 1126, the question was whether

§ 206 (f) of the Transportation Act, providing that "the period of Federal control shall not be computed as a part of the periods of limitation," was applicable in cases where the period of limitation had already expired, and if so, whether it was constitutional.

The Interstate Commerce Commission, overruling the carrier's contention "that plaintiff's right expired before the passage of the Transportation Act, and was not revived by § 206 (f)," 268 U. S. 634, 60 L. ed. 1128, awarded reparation. Suit was brought on the award and the carrier demurred "on the ground, among others, that § 206 (f), as construed and applied by the Commission, was unconstitutional; and that so to renew or revive the cause of action, which had expired before the passage of the Transportation Act, was to take defendant's property without due process of law, in contravention of the 5th Amendment." 268 U. S. 635, 69 L. ed. 1128.

The District Court sustained the demurrer and this Court affirmed the decision, saying:

> "Plaintiff's cause of action was created and limited by the Interstate Commerce Act. . . .
>
> "Plaintiff's right to file his claim with the Commission had expired several months before the passage of the Transportation Act. But, if the period of Federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the Commission, and had no cause of action. *It is settled by the decisions of this Court that the lapse of time not only*

barred the remedy, but also destroyed the liability of defendant to plaintiff." 268 U. S. 635-636, 69 L. ed. 1128. [Italics ours.]

The opinion concludes as follows:

"Section 206 (f) will not be construed retroactively to create liability. *To give it that effect would be to deprive defendant of its property without due process of law, in contravention of the 5th Amendment.*" 268 U. S. 637, 69 L. ed. 1129. [Italics ours.]

The principle of this decision is applicable here.

Conclusion.

The decrees of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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E. I. du Pont de Nemours & Co.

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March, 1931.

APPENDIX.

Statutes Involved.

Section 10 (f) of the Trading with the Enemy Act, under which the suits were brought, provided:

> "The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after

payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

"If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable." (40 Stat. 421-422.)

Section 19 of the Settlement of War Claims Act of 1928 amended the foregoing by adding the following new paragraph:

" 'In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred, or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been

brought by the owner within the meaning of this subsection in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trademark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trademark, print, label, or copyright was seized or otherwise acquired by the Alien Property Custodian.'" (45 Stat. 277.)

Section 10 (c) of the Trading with the Enemy Act, under which the du Pont Company got its license to use the patents in question, provided:

"Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label or copyrighted mat-

ter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding $100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof." (40 Stat. 420-421.)

Section 10 (d) provided:

"The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by the President; and sums so paid

shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian." (40 Stat. 421.)

By an Executive Order dated October 12, 1917, pursuant to § 5 (a) of the Trading with the Enemy Act, the powers and duties of the President under §§ 10 (c) and 10 (d) were delegated to the Federal Trade Commission. (Rec. 96.)

Section 7 (c) of the Trading with the Enemy Act, as amended by the Act of November 4, 1918, under which the patents were seized by the Alien Property Custodian, provided:

"'If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized

by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * * *

"'The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.'". (40 Stat. 1020, 1021.)

The fourth paragraph of § 12 of the Trading with the Enemy Act as amended by the Act of March 28, 1918, under authority of which the Alien Property Custodian sold the patents to the Chemical Foundation, provided:

"'The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the Presi-

dent shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees with the United States issuing shares or certificates representing beneficial interests

to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.' " 40 Stat. 460.)